APPENDIX

Floyd MORGAN, Appellant,

v.

STATE of Florida, Appellee.

No. 54939.

Supreme Court of Florida.

March 18, 1982.

Rehearing Denied July 9, 1982.

Defendant was convicted in the Circuit Court in and for Union County, Theron A. Yawn, Jr., J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that: (1) the trial court complied with the requirement of certification of the "entire record" by certifying the reported and transcribed materials along with all documents of record; (2) the trial court adequately inquired into the voluntariness of defendant's confession by holding a hearing outside presence of the jury on such question; (3) the trial court properly denied defendant's motion to exclude employees of the state prison system from service on the jury; (4) the trial court erred in sustaining State's objection to a question asked on cross-examination of State witness as to whether he had ever made other knives while in prison, but such error was harmless; and (5) the sentence of death was properly imposed.

Affirmed.

1. Criminal Law ⇐1086.1, 1166.13

In prosecution for murder in which defendant was sentenced to death, trial court complied with statutory requirement of "certification by the sentencing court of the entire record" by certifying reported and transcribed materials along with all documents of record, and fact that parts of the proceedings were not reported did not prejudice defendant's appeal. West's F.S.A. § 921.141(4); West's F.S.A. Rules App. Proc., Rule 9.200.

2. Criminal Law ⇐577.16(6)

In prosecution for murder, trial court did not commit reversible error in denying defendant's pro se motion to discharge without holding a hearing on possibility of an intentional and prejudicial delay of prosecution, in that his motion was not effective to raise issue of denial of due process resulting from four-month delay between crime and the indictment. U.S.C.A.Const. Amends. 5, 6, 14.

3. Constitutional Law ⇐266.1(5)
Criminal Law ⇐519(1)

In prosecution for murder, trial court did all that was required to protect defendant's rights under Fifth Amendment by holding a hearing outside presence of jury on question of voluntariness of defendant's confession, and court correctly determined the confession to be admissible. U.S.C.A. Const.Amend. 4.

4. Jury ⇐82(3)

In prosecution for murder, trial court did not err in denying defendant's motion to exclude employees of state prison system from service on the jury. West's F.S.A. §§ 40.07, 40.07(2).

5. Criminal Law ⇐663

In prosecution for murder, trial court properly refused to allow State witness to make drawing of knife witness said he had made for defendant on a blackboard in response to defense counsel's request on basis that such an illustration could not be preserved and made a part of the record, as that question of what method of cross-examination to allow was a matter for sound discretion of trial court.

6. Witnesses ⇐270(2)

In prosecution for murder, trial court correctly sustained State's objection on ground of relevance to defense counsel's question on cross-examination of State witness, a fellow inmate of defendant, concerning how long witness had been confined at the correctional institute.

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7. Criminal Law ⇐1170½(1)
Witnesses ⇐270(2)

In prosecution for murder, tria
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ground of relevance to question as
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State witness, inmate who had n
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counsel asked witness whether he ha
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responded that he had not, and whet
had ever made a knife before and
sponded that he had.

8. Criminal Law ⇐1169.2(1)

When court errs in disallowing e
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elicited are brought before jury th
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9. Criminal Law ⇐645

In prosecution for murder, trial
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allow defense counsel to reopen his cl
argument for purpose of commentin
State's failure to call defendant's cell
as a witness.

10. Constitutional Law ⇐57
Criminal Law ⇐1206(1)

Death penalty statute is not unco
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preme Court, in that aggravating and
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substantive law, and to the extent
statute pertains to procedural matter
was incorporated by reference in rul
criminal procedure promulgated by
preme Court. West's F.S.A. § 921.
West's F.S.A.Const.Art. 5, § 2(a); We
F.S.A. Rules Crim.Proc., Rule 3.780.

11. Criminal Law ⇐986.6(3)

In prosecution for murder in which
fendant, a prison inmate, was sentenced

nal Law ⇐577.16(6)
rosecution for murder, trial court ommit reversible error in denying t's pro se motion to discharge olding a hearing on possibility of ional and prejudicial delay of pros that his motion was not effective sue of denial of due process result- four-month delay between crime indictment. U.S.C.A.Const. 5, 6, 14.

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osecution for murder, trial court t was required to protect defend- ts under Fifth Amendment by hearing outside presence of jury n of voluntariness of defendant's , and court correctly determined sion to be admissible. U.S.C.A. nd. 4.

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⇐270(2)
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7. Criminal Law ⇐1170½(1)
Witnesses ⇐270(2)
In prosecution for murder, trial court erred in sustaining State's objection on ground of relevance to question asked by defense counsel on cross-examination of State witness, inmate who had made a knife for defendant, concerning whether witness had ever made other knives while in prison; however, error was harmless where in subsequent cross-examination defense counsel asked witness whether he had ever before been asked to make a knife and he responded that he had not, and whether he had ever made a knife before and he responded that he had.

8. Criminal Law ⇐1169.2(1)
When court errs in disallowing certain evidence or a question or series of questions on cross-examination but substantially the same matters sought to be presented or elicited are brought before jury through other testimony of same or another witness, the error is harmless.

9. Criminal Law ⇐645
In prosecution for murder, trial court did not abuse its discretion in refusing to allow defense counsel to reopen his closing argument for purpose of commenting on State's failure to call defendant's cellmate as a witness.

10. Constitutional Law ⇐57
Criminal Law ⇐1206(1)
Death penalty statute is not unconstitutional on basis that statute regulates matters of criminal trial practice and procedure which are exclusively province of Supreme Court, in that aggravating and mitigating circumstances in such statute are substantive law, and to the extent that statute pertains to procedural matters, it was incorporated by reference in rule of criminal procedure promulgated by Supreme Court. West's F.S.A. § 921.141; West's F.S.A.Const.Art. 5, § 2(a); West's F.S.A. Rules Crim.Proc., Rule 3.780.

11. Criminal Law ⇐986.6(3)
In prosecution for murder in which defendant, a prison inmate, was sentenced to death, defendant was not entitled to a new sentencing trial on basis that jury that recommended death penalty was made aware of fact that defendant's previous conviction of second-degree murder was obtained pursuant to an indictment for first-degree murder, in that such fact was relevant not only to fully apprise jury of background of defendant's previous conviction, but also to rebut defendant's attempt to show that his history of criminal activity was not significant. West's F.S.A. § 921.141(5)(b).

12. Homicide ⇐354
In prosecution for murder, death sentence was properly imposed based on findings that at time of the murder, defendant was under sentence of imprisonment, that defendant had previously been convicted of a felony involving use or threat of violence, and that the capital felony was especially heinous, atrocious, or cruel. West's F.S.A. § 921.141(5)(a, b, h).

Michael E. Allen, Public Defender and Margaret Good, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

FACTS

Appellant was convicted of the murder of Joe Saylor, who was stabbed to death in his cell in Union Correctional Institute at approximately 2:00 a. m. on July 16, 1977. At the time of the murder, appellant was under a sentence of thirty years imprisonment for second-degree murder.

Glynn Griffin, another inmate, testified that at appellant's request he made a knife for him in the prison shop. At the trial,

Griffin identified a knife as the one he made. The knife was admitted into evidence. Griffin testified further that appellant told him he wanted the knife in order to stab a man who owed him $400 and would not pay.

Dan Helton, one of appellant's cellmates, testified that he, the victim Joe Saylor, and two other prisoners were in their cell in bed and asleep by 12:00 midnight on the night of July 15. Helton testified that he was later awakened by a yell following which a cellmate told him to turn on the light. Then he saw Joe Saylor on the floor covered with blood.

Michael Daly, a prisoner whose cell was nearby, testified that he was sitting at a table in the hall writing a letter that night after most of the other prisoners had gone to sleep. He heard noises from appellant's cell. Then, appellant walked out of the cell. He walked down the hall toward a lavatory. Daly followed him to find out what had happened. In the lavatory, he saw that appellant's right hand was cut on the palm side across the base of the fingers.

William Williamson, who slept in a nearby cell, was reading at 2:00 a. m., he testified, when he heard noises. He went out of his room and saw appellant, whose hand was bleeding. Morgan said, "I killed him."

On the morning of the murder, appellant was interrogated by prison investigators. Inspector Ackett testified that appellant voluntarily made a statement admitting that he committed the murder. That same day, appellant was removed from his residence at Union Correctional Institute and taken to the Lake Butler Reception and Medical Center, where he was confined until September 9, 1977. Then he was transferred to Florida State Prison until his arraignment on January 16, 1978. Appellant was indicted on November 28, 1977, and was represented by counsel at his arraignment.

On May 19, 1978, appellant filed a *pro se* motion for discharge from the accusation made in the indictment, asserting that the state's failure to afford him a "prompt first appearance" under Florida Rule of Criminal Procedure 3.130(b) and its failure to afford him a probable cause determination under Florida Rule of Criminal Procedure 3.131 and the cited case of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), had denied him due process of law. The trial judge denied the motion without a hearing and declared in his order that he would not consider any more *pro se* motions of the defendant.

Inmate Helton's testimony included reference to Alvin Robitaille, another of appellant's cellmates. Helton testified that Robitaille was present in the cell when the lights were turned on and Saylor's body discovered. Robitaille was listed by the state as a prospective witness, but was never called to testify. At the conclusion of the evidence, the defense had the "middle" closing argument, preceded and followed by the closing remarks of the state's counsel. After the defense made its closing remarks, the court took a ten minute recess. After court reconvened, the defense asked to briefly re-open its closing argument for the purpose of commenting on the state's failure to call Robitaille as a witness. The court denied this request.

ISSUES ON APPEAL OF THE JUDGMENT OF CONVICTION

[1] Appellant contends that the trial court committed reversible error in failing to ensure the reporting and transcription of all of the proceedings below. He argues that the requirement in section 921.141(4), Florida Statutes (1977), of "certification by the sentencing court of the entire record," together with the constitutional requirement of uniformity in capital sentencing which appellate review is designed to ensure, mandate that all proceedings leading to a judgment of conviction of a capital felony be reported, transcribed, and made a part of the record. Appellant points out that his arraignment, a number of pre-trial hearings, and several bench conferences appear not to have been reported.

The state responds by pointing out that all of the court reporter's notes of proceedings before the trial court were t
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So.2d 692 (Fla. 1st DCA 1977)
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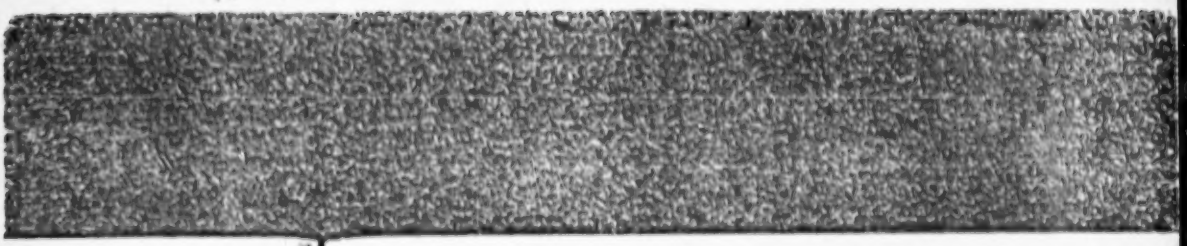

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ings before the trial court were transcribed, made a part of the record, and forwarded to the supreme court for review. The state argues that this complied with section 921.-141(4) and Florida Rule of Appellate Procedure 9.200. We sustain the state's position. By certifying the reported and transcribed materials along with all the documents of record, the court complied with the requirement of certification of the "entire record." The fact that parts of the proceedings were not reported has not prejudiced the appeal in this case.

[2] Appellant contends that the trial court committed reversible error in denying his *pro se* motion to discharge without holding a hearing on the possibility of intentional and prejudicial delay of prosecution. In his testimony on behalf of the state's proffer of appellant's confession, Inspector Ackett testified that following his inculpatory statement, appellant asked to see an attorney. Appellant now argues that the state's delay of over four months in bringing the charge and six months before providing counsel and an appearance before a judicial officer denied him due process of law. He contends that his May 19, 1978 motion raised this issue and should not have been denied without inquiry into the reasons for and the prejudice caused by the delay.

Appellant correctly points out that there are cases where the Due Process Clause is implicated by prosecutorial delay even though neither the defendant's right to a speedy trial nor the applicable statute of limitations are offended. *See United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); *State v. Griffin*, 347 So.2d 692 (Fla. 1st DCA 1977), *cert. dismissed*, 358 So.2d 134 (Fla.1978). We do not find, however, that appellant's May 19, 1978 motion was effective to raise the issue of prejudice resulting from the four-month delay between the crime and the indictment occurring the previous summer and fall. If the pre-accusation delay was intentional and prejudiced the defense, and presented an issue of denial of due process, appellant should have moved to dismiss the indictment on that ground as soon as possible after the indictment was returned. Moreover, we find that the delay in the appointment of counsel did not prejudice the appellant.

[3] Appellant contends that the trial court failed to make a sufficiently thorough inquiry into the voluntariness of his confession. In the absence of adequate inquiry, he argues, it was error to admit testimony about the confession and therefore he is entitled to a new trial. Appellant claims that there was an inconsistency between the testimony of the state's witness and the representations of the state's counsel on the question of whether a tape recording of appellant's statement conclusively showed that appellant confessed before asking for an attorney. This argument is without merit. If the tape showed anything that would have raised a question on this issue, appellant could have presented it to the court. The trial court found that the confession was voluntary based on the evidence submitted. The court did not abuse its discretion by not making further inquiry on its own motion. By holding a hearing outside the presence of the jury on the question of the voluntariness of the confession, the court did all that was required to protect appellant's rights under the Fifth Amendment. *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). We find that the court correctly determined the confession to be admissible.

[4] Appellant contends that the trial court erred in denying his motion to exclude employees of the state prison system from service on the jury. His motion was based on the allegation that Union County, where the trial was held, has a disproportionate share of its eligible population in the employ of the state prison system due to the presence of numerous correctional facilities in that region of the state. Appellant argues that section 40.07, Florida Statutes (1977), which disqualifies sheriffs, deputies, and municipal police officers from jury service, should be construed to apply to correctional officers.

We decline to hold that all correctional officers were intended to be included within the classes of persons disqualified from jury service by section 40.07(2). In their briefs, both parties agree that since appellant did not exhaust all his peremptory challenges to prospective jurors, we are not required to consider whether any juror served who should have been excused for cause. *Young v. State*, 85 Fla. 348, 96 So. 381 (1923). Nevertheless, we have reviewed the transcript of jury selection. We are satisfied that all persons selected were qualified; none were subject to challenge for cause.

[5] Appellant presents three instances in which he contends the trial court improperly limited his cross-examination of state witness Glynn Griffin. The first instance had to do with Griffin's testimony about the knife. On direct examination, Griffin described the knife he said he made for appellant. The knife itself had not yet been admitted into evidence. On cross examination, appellant's counsel sought to have the witness make a drawing of the knife on a blackboard. The court refused to allow the blackboard drawing on the ground that such an illustration could not be preserved and made a part of the record. Appellant argues that this ruling prevented effective cross examination and thereby abridged his right to confront the witnesses against him.

The court's ruling on appellant's proposed use of chalk drawings on a blackboard was a limitation on the method, not the substance, of appellant's cross examination of Griffin. Appellant now argues that a blackboard drawing could have been preserved for the record by photographing it. Appellant did not propose this solution in the trial court, however. Nor did he ask that the witness be permitted to draw the knife with pencil and paper. The question of what method of cross examination to allow was a matter for the sound discretion of the trial court and appellant has not shown that the court abused its discretion.

Appellant also contends that the trial court twice more improperly limited cross examination, abridging the right to confrontation of witnesses, when it sustained the state's objections to two questions asked witness Griffin on cross examination. The questions were whether he had ever made other knives while in prison and how long he had been incarcerated at Union Correctional Institute.

[6] With regard to the question of how long Griffin had been confined at Union Correctional Institute, we hold that the trial court was correct in sustaining the state's objection on the ground of relevance. Appellant argues that information on the seriousness of the crime for which Griffin had been imprisoned, and inferences about how much of his sentence remained to be served, would have been relevant to show his interest in cooperating with the state. We do not see the relevance. The defense was allowed to impeach Griffin's credibility in the standard fashion. Thereby it was brought out that he had been convicted of crimes three times. The length of his past incarceration at Union Correctional Institute was irrelevant to any material issue and the objection was properly sustained.

[7,8] With regard to the question whether Griffin had ever made a knife before, however, we believe the defense inquired into a relevant matter. Since it was established that Joe Saylor was stabbed to death, the fact that Griffin may have made other knives was just as relevant as was the fact that he made one for appellant. Therefore the trial court erred in sustaining the state's objection on the ground of relevance. However, the error was harmless. In subsequent cross examination defense counsel asked Griffin whether he had ever before been asked to make a knife and he responded that he had not. Defense counsel asked him whether he had ever made a knife before and he responded that he had. Thus the defense was permitted to ask substantially the same question that had earlier been disallowed and the court's earlier error was cured. When the court errs in disallowing certain evidence or a question or series of questions on cross examination but substantially the same matters sought to be presented or elicited are brought before the jury through other testimony of the same or another witness, harmless. *Palmes v. State*, 39 (Fla.1981); *Denmark v. State*, 116 So. 757 (1928); *Bak* 41, 11 So. 492 (1892), *overru Tipton v. State*, 97 So.2d 27

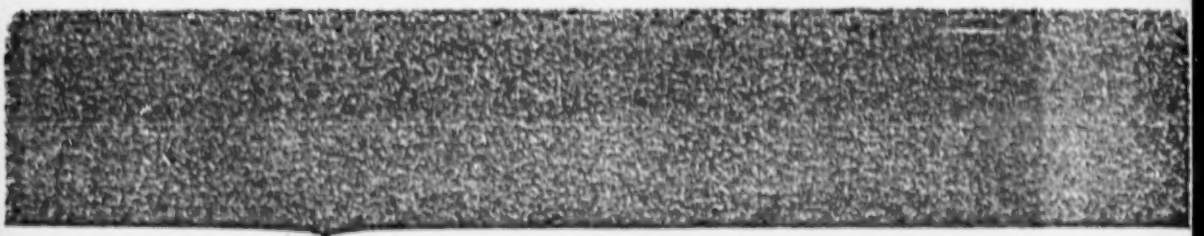
[9] Appellant contends th court abused its discretion in allow defense counsel to reope argument for the purpose of on the state's failure to call ap mate Robitaille as a witness. points out that the testimony of placed Robitaille in the room at the murder. Therefore, he a aille was almost certainly a knowledge of material facts. T such a person was not called appellant claims, was a proper comment by defense counsel.

The court denied the request ing of defense counsel's argu ground that since the defense called Robitaille as easily as co state, the comment defense co to make would have been impr

We agree with appellant th that Robitaille was not produc ness was a matter "within th that considerable degree of la is allowed counsel in argumen *State*, 97 Fla. 650, 661, 122 S (1929). Had defense counsel make an appropriate comment time allotted to him for argume ment would have been permi court was not obliged, however, the orderly flow of the trial t defense a second opportunity matter to the attention of th trial court's ruling should no require reversal unless "clearl and prejudicial." *Id.* at 662, 12

SENTENCE

[10] Appellant contends th tence of death must be vacat section 921.141, Florida Stat pursuant to which the senten posed, is unconstitutional. He the statute seeks to regulate



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[9] Appellant contends that the trial court abused its discretion in refusing to allow defense counsel to reopen his closing argument for the purpose of commenting on the state's failure to call appellant's cellmate Robitaille as a witness. Appellant points out that the testimony of Dan Helton placed Robitaille in the room at the time of the murder. Therefore, he argues, Robitaille was almost certainly a person with knowledge of material facts. The fact that such a person was not called to testify, appellant claims, was a proper subject for comment by defense counsel.

The court denied the request for reopening of defense counsel's argument on the ground that since the defense could have called Robitaille as easily as could have the state, the comment defense counsel wished to make would have been improper.

We agree with appellant that the fact that Robitaille was not produced as a witness was a matter "within the bounds of that considerable degree of latitude which is allowed counsel in argument." *Pell v. State*, 97 Fla. 650, 661, 122 So. 110, 114 (1929). Had defense counsel managed to make an appropriate comment within the time allotted to him for argument, the comment would have been permissible. The court was not obliged, however, to interrupt the orderly flow of the trial to afford the defense a second opportunity to bring the matter to the attention of the jury. The trial court's ruling should not be held to require reversal unless "clearly erroneous and prejudicial." *Id.* at 662, 122 So. at 115.

SENTENCE

[10] Appellant contends that his sentence of death must be vacated because section 921.141, Florida Statutes (1977), pursuant to which the sentence was imposed, is unconstitutional. He argues that the statute seeks to regulate matters of criminal trial practice and procedure, which are exclusively the province of this Court under the rule-making power assigned to it by article V, section 2(a), Florida Constitution.

This argument is without merit. The aggravating and mitigating circumstances enumerated in section 921.141 are substantive law. *Vaught v. State*, 410 So.2d 147 (Fla.1982); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, *Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

> The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., [*sic*] actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

Id. at 9. To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. *See The Florida Bar, Re Florida Rules of Criminal Procedure*, 343 So.2d 1247, 1263 (Fla.1977).

Appellant contends that section 921.141 is unconstitutional as applied to him because the judge and jury were precluded from giving proper consideration to the evidence he offered in mitigation of his crime. He argues that the procedure utilized at his sentencing trial pursuant to section 921.141 prevented the judge and jury from assigning the proper weight to his mitigating evidence and that this violated principles of the Eighth and Fourteenth Amendments developed in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We have specifically held, however, that section 921.141 and the procedure utilized thereunder are in keeping with the principles of *Lockett*. *Songer v. State*, 365 So.2d 696 (Fla.1978) (on rehearing), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

[11] Appellant contends that he is entitled to a new sentencing trial because the jury that recommended the death penalty was made aware of the fact that appellant's previous conviction of second-degree murder, for which he was serving a thirty-year sentence at the time of the instant murder, was obtained pursuant to an inglictment for first-degree murder. Appellant argues that apprising the jury of this fact violated the principles of *Elledge v. State*, 346 So.2d 998 (Fla.1977) and *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1069 (1977), which hold that only convictions, and not mere accusations, may be presented to establish the statutory aggravating circumstance of previous conviction of violent crime. *See* § 921.141(5)(b), Fla.Stat. (1977).

The rule of *Provence* that "mere arrests or accusations" may not be considered as factors in aggravation does not require a new sentencing trial in this case. Here there was no "mere" accusation that had not led to a conviction. There was an accusation of first-degree murder that led to a conviction for second-degree murder. This was relevant not only to fully apprise the jury of the background of appellant's previous conviction, it was also relevant to rebut appellant's attempt to show that his history of criminal activity was not significant. Furthermore, we note that appellant did not object to allowing the previous indictment to go to the jury at the time it was introduced, but raised the issue for the first time in his motion for new trial. We perceive no error.

[12] Finally, appellant contends that the trial court erred in its evaluation of the circumstances of this case and that the sentence of death is simply inappropriate. The judge found that at the time of the murder, appellant was under sentence of imprisonment, § 921.141(5)(a), Fla.Stat. (1977); that appellant had previously been convicted of a felony involving the use or threat of violence, *id.*, § 921.141(5)(b); and that the capital felony was especially heinous, atrocious, or cruel, *id.*, § 921.141(5)(h). The first two aggravating circumstances found were amply supported by evidence of appellant's incarceration and documentation of his previous judgment of conviction of second-degree murder, rendered on an indictment for first-degree murder. Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance is also supported. The evidence showed that death was caused by one or more of ten stab wounds inflicted upon the victim by appellant. *See Rutledge v. State*, 374 So.2d 975 (Fla.1979), *cert. denied*, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); *Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

The trial judge found that there were no mitigating circumstances. We uphold this finding against appellant's contentions of error. The jury recommended that a sentence of death be imposed. We hold that under these circumstances, the death sentence is proper.

The judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

Frederick W. CHAPMAN and Liberty Mutual Insurance Company, Appellants,

v.

Dennis P. DILLON, Jr., etc., Dennis P. Dillon, and Aurelia M. Dillon, etc.

No. 61013.

Supreme Court of Florida.

March 18, 1982.

Rehearing Denied July 7, 1982.

Action was brought by parents and minor child to recover for injuries child sustained in automobile acciden Court, Brevard County, Virg J., found provisions of 1979 ance law to be constitutional, appealed. The District Cou 404 So.2d 354, reversed, and pealed. The Supreme Court, that: (1) regardless of actu recovery, injured person will payment for his major and s losses even when he himself thus 1979 no-fault provisions constitutional right of access legislature's no-fault objectiv prompt recovery of expense tracted litigation are still b thus no-fault personal inju benefits, tort liability exemp ductibles do not deny due pr no-fault threshold provisions, some sort of permanent injur for pain and suffering can b not unconstitutionally deny equal protection.

Decision of District Cou reversed and case remanded tions.

Overton, J., filed a conc

Sundberg, C. J., filed a curring in part and dissenti which Adkins, J., joined.

1. Automobiles ⇐251.12

Since regardless of actu recovery, an injured person prompt payment for his maj economic losses even when h fault, and since lowering pe protection benefits and incre of permitted optional deductib necessarily result in reduced and increase litigation, no-fa still provide reasonable alterna tional action in tort, and thus benefits and raising permissib did not violate constitutional right of access to the courts. §§ 627.736(1), 627.737, 627.7

2. Automobiles ⇐251.12
Constitutional Law ⇐381

Since under new no-fault jured party still recovers most

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 9, 1982

FLOYD MORGAN, **

Appellant, ** CASE NO. 54,939

vs. ** Circuit Court Case No. 77-141-CF (Union)

STATE OF FLORIDA, **

Appellee. **

On consideration of the motion for rehearing filed by attorney for appellant, and reply thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. Margie Cason, Clerk
Hon. Theron A. Yawn, Jr., Judge

Melanie Ann Hines, Esquire
Raymond L. Marky, Esquire

SECTION 921.141, FLORIDA STATUTES (1977)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.